In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1522

CECIL D. ANDRUS, Secretary of the Interior,
Plaintiff,

v.

STATE OF UTAH,
Defendant.

ON PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Brief for Amicus Curiae

State of California (by and through its State Lands Commission)

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INTEREST OF AMICUS CURIAE

California, like most of the other western states, was granted the sixteenth and thirty-sixth section in every township to be held and administered in trust for the perpetual benefit of the public schools. Act of March 3, 1853, 10 Stat. 244. The trust nature of the school lands grant is, as the court below indicated, unique, resembling in some degree the public trust in which the states hold their sovereign land. *Alabama v. Schmidt* (1914) 232 U.S. 168. In

the event any of the lands within this specific "in place" grant are not available by reason of preexisting rights of others, the states have historically had the right to select other land in lieu of such preempted acreages. *McCreery v. Haskell* (1886) 119 U.S. 327. The State of California has, as petitioners point out, outstanding rights to select approximately 180,000 acres of such school-indemnity lands. Other western states have corresponding interests. Petition for Certiorari, page 12, footnote 9.

Because of time considerations, we have been unable to circulate this brief for the review and approval of other affected states. However, we are authorized to represent that the following states, acting by and through their state land agencies and attorneys general, join us in urging this Court to grant certiorari and summarily affirm the decision below: Arizona, Nevada, Washington, New Mexico, and Montana.

QUESTIONS PRESENTED

1. Do the provisions of the Taylor Grazing Act confer discretion on the Secretary of the Interior to impose conditions on indemnity land selections made by states in addition to those set forth in sections 851 and 852, 43 United States Code?

2. Does the authority to classify lands set forth in section 7 of the Taylor Grazing Act (43 U.S.C. § 315(f)) give the Secretary the power, uncontrolled by any statutory standards to compare the value of lost base lands with the value of indemnity selections made by a state pursuant to its Congressional grant and decline to approve state selections if he determines their values to be disparate?

The states represented in this brief believe the decision below presents accurate answers to these questions. The Secretary of the Interior has suggested, however, the possibility that he may seek to restrict that decision narrowly,

thus necessitating multiple actions throughout the Ninth and Tenth Circuits. See Petition for Certiorari, p. 12, stating only that the Secretary "may deem himself compelled" to apply the decision equally throughout the circuits. Although the law is clear, the need for uniformity of decision on this important question of federal-state relations compels summary affirmance by this Court.

ARGUMENT

I. The Discretion of the Secretary of the Interior in His Review of Indemnity Selections Is Limited to That Conferred on Him by Statute. He Is Neither Impliedly Nor Expressly Authorized to Impose Additional Conditions on the Statutory Rights of States to Lieu Lands

The policy of making "in place" grants and in particular, school land grants, to the newly-admitted states dates back at least to 1785. As the court below points out, it was established as a quid pro quo to compensate newly-admitted states for revenues lost when, as a condition to their admission, they were prohibited from taxing federal lands retained within their boundaries. *Utah v. Kleppe* (10th Cir. 1978) 586 F.2d 756, 758.

As settlement of the new states accelerated, the lands allocated to them increasingly became subject to claims by private persons before they could be surveyed and set aside. Similarly, sections were incorporated into federal reservations. In order to compensate states for lands thus lost, Congress provided for the selection of other public lands, so-called "lieu" lands, in their place. A state may waive its rights to particular school land parcels and elect to acquire such lieu lands instead. Presently, the prerequisites for such selections are set forth in sections 851 and 852, Title 43, United States Code. Once it appears that these requirements have been met, it becomes the duty of the Secretary

of the Interior to approve and "clear-list" the selection. The state concerned acquires an equitable interest in the lands as of the date of the initial selection, and legal title upon the Secretary's clearance. *Payne v. New Mexico* (1921) 255 U.S. 367. Concurrently, the United States acquires a similar interest in base lands in which the state has waived its rights. *California v. Deseret Water Co.* (1917) 243 U.S. 415.

Statutory references to the "approval" by the Secretary of such selections have consistently been construed as merely giving him the duty of ascertaining whether the selection complies with applicable statutory conditions. *Payne v. New Mexico, supra,* 255 U.S. at 371; *Wyoming v. United States* (1921) 255 U.S. 489, 502-503.

The standards for selection of "lieu lands" are set forth currently in section 852, title 43, United States Code. Insofar as is relevant here, that statute permits the selection of such lands "from any unappropriated, surveyed or unsurveyed public lands within the state where such losses or deficiencies occur, subject to the following restrictions:

> "(1) No lands mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State;
>
> "(2) No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made as indemnity for lands on such a structure lost to the State because of appropriation before title could pass to the State . . ." 43 U.S.C. § 852.

The record below on which the Court of Appeals relied indicates that, prior to 1967, the Secretary of the Interior did not believe himself authorized to consider disparity of values between base lands (i.e., lands unavailable because

of preexisting rights or federal reservation) and lands selected. E.g., Memorandum of September 14, 1962, Associate Solicitor, Division of Public Lands, to Director, Bureau of Land Management, Utah's Appendix B; Memorandum of February 11, 1943, Commissioner of the General Land Office to the Secretary, both cited in *Utah v. Kleppe,* supra, 586 F.2d at 762-763. In 1967, the Secretary reversed himself, and adopted the policy that, relying on his discretion under section 7 of the Taylor Grazing Act, he would refuse to approve indemnity applications that involve "grossly disparate values." Id., 586 F.2d at 762. This reinterpretation of the Act was taken notwithstanding rejection by Congress, in the preceding year, of legislation that would have amended the indemnity statutes to incorporate the equal value concept. In 1966 sections 2275 and 2276 of the Revised Statutes (43 U.S.C. §§ 851-852) were amended to liberalize the indemnity selection program. P.L. 89-470; 80 Stat. 220. In its report on this legislation, the Department of the Interior stated:

> "The bill does not deal with the equal value concept with respect to lands valuable for leaseable minerals involved in State selections. We have previously recommended language designed to resolve this problem. Our primary purpose was to inform the Congress of the facts, and to give the Congress an opportunity to legislate on the subject if it wishes to do so. In the House of Representatives, H.R. 16 embodies the equal value concept. The House committee tabled that bill after hearings, and reported H.R. 5984 without the equal value concept. The problem was called to your attention in our report on S 1883. We believe the subject merits consideration by your committee. In our prior reports we stated a preference for legislation which included this concept, but indicated no objection to the enactment of a bill without it." Sen.Rep. No.

1213, 2 U.S. Code & Adm. News, 89th Congress, 2nd Sess. (1966).

Thus it appears that the Secretary took it upon himself to accomplish administratively what Congress declined to do legislatively.

Each time the Secretary has attempted to assume greater discretion than that plainly given him by the applicable statute in indemnity programs, he has been rebuffed by the courts. Thus, attempts to withdraw lawfully selected lands because of subsequent developments have consistently been declared to be unlawful. E.g., *Payne v. New Mexico, supra,* 255 U.S. 367 (state selection met statutory requirements when made; base tract subsequently withdrawn from federal reservation); *Wyoming v. United States, supra,* 255 U.S. 489 (state selection met statutory requirements; land subsequently found to be mineral-producing).

The recent decision in *Bronken v. Morton* (9th Cir. 1973) 473 F.2d 790, cert. denied 414 U.S. 828, is particularly analagous. There, the Secretary made a decision similar to the one under attack here to set a ceiling on the value of lands available to holders of "valentine" scrip, which gave its holders the right to select equal quantities of unappropriated public lands in place of lands held by them under Mexican grants and subsequently lost to claimants under United States patents. The Court held his action to be unauthorized: "Congress placed no value limitations on the lands which might be selected under (the Act). Notwithstanding (its) clear provisions and the state of existing law at the time of the Act's passage, the Secretary refused to process applications for land he deemed too expensive." Id. at 795. Thus his action in so doing was held to be unlawful.

II. Nothing in the Taylor Grazing Act Confers Discretion on the Secretary of the Interior to Impose Additional Conditions on State Indemnity Land Selections

Since the Secretary of the Interior was unable to persuade Congress to grant him direct authority to impose the equal value test on indemnity selections, he attempted to fall back on his powers to classify certain lands under the Taylor Grazing Act. His contentions thus raise the issue as to whether Congress in enacting the Taylor Grazing Act in 1934 (43 U.S.C., § 315 et seq.) intended to impose an "equal value" rule on the states in their selection of lands to compensate them for losses in the grant of school lands. The district court and court of appeals held, correctly, it did not. We do not propose here to detail the complete history of the Taylor Grazing Act nor the provisions relating to the selection of "lieu" lands as indemnity for losses in the school land grants. These have already been set forth in illuminating detail in the brief of the State of Utah and in the decision of the court of appeals itself. We fully agree with the contentions and arguments set forth in that brief and the decision of the court of appeals. We would, however, like to take this opportunity to set forth the salient points raised to show this Court that the decisions below were entirely correct in reaching the conclusion that the "equal value" premise advanced by the Secretary of the Interior can have absolutely no applicability to indemnity selections made by the states.

We begin with the basic premise that the school land grants were the result of and comprise a portion of a compact made by and between the states and the United States. The basic terms of this compact were that the states would not tax public lands owned by the United States; nor would they interfere with the disposition of those lands by the federal government. In return the United States granted

various sections of land to the states in trust for the support of schools. (*State of Nebraska v. Platte Valley Power & Irr. Dist.* (Neb. 1946) 23 N.W.2d 300.) Further, this compact or trust is not grounded entirely on a contract theory but directly springs from the fundamental constitutional requirements of the "equal footing" doctrine. (See, e.g., *U.S. v. Morrison* (1916) 240 U.S. 192; *Heydenfeldt v. Daney Gold and Silver Min. Co.* (1876) 93 U.S. 634.

The second basic premise is that state indemnity selections are governed by sections 851 and 852 of title 43 of the United States Code and these sections clearly and unequivocally state that indemnity selections shall be made on an acre for acre basis.

It is apparently conceded by the Secretary that at least prior to 1934 there was no "equal value" provision in a state school indemnity selection and the states were free to select lands on a per acre basis for losses due to federal reservations for national parks and forests and other causes. (See e.g., 43 U.S.C. 851, 852.) However, in 1934, Congress enacted the Taylor Grazing Act. The purpose of the act was to:

> "... halt the destructive use of the public rangelands and to prevent the continued breakup of natural grazing areas by homesteading, which was taking the land with access to water and leaving useful grasslands without any water." (*History of Public Land Law Development,* Public Land Law Rev. Com., ch. XXI, p. 607.)

Now the Secretary contends that this act—having the express purpose of preventing the destruction and degradation of natural grazing acres—gives him the power to thwart the entire purpose of the congressional grant to the states to support public schools and to breach the covenant between the United States and the states by giving him the discretion to disapprove any state selection for a wide

variety of reasons not solely confined to "equal value." (See, e.g., Petition for Writ of Certiorari p. 11.) No such congressional intent can be gleaned from the Taylor Grazing Act. *Payne v. New Mexico, supra,* 255 U.S. 367 and *Wyoming v. United States, supra,* 255 U.S. 489, both hold that the Secretary's duties in indemnity selections are not discretionary in nature. These holdings have been affirmed in *Lewis v. Hickel* (9th Cir. 1970) 427 F.2d 673, cert. den., 400 U.S. 992 (1971) and *Wilcoxson v. United States* (D.C. Cir. 1963) 313 F.2d 884.

The Taylor Grazing Act makes no direct reference to state lieu selections. Indeed the act states:

> "Nothing in this chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this chapter, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this chapter, would be a part of any grant to any State." (43 U.S.C. sec. 315.)

The import of this language is clear. The states (as the Secretary concedes) are entitled to the school land sections in place in lands subject to the act. Unless the act *expressly* provides otherwise, their rights to "initiate" lieu land selections likewise remain as before. In short, there is nothing at all in the act which "expressly provides" that the Secretary is granted additional authority with respect to lieu or indemnity selections as those selections relate to school lands. Indeed the language of section 315 is an express recognition by Congress of the sanctity and importance of the school land grant.

Even, assuming for the sake of argument that the Taylor Grazing Act *could* be construed to give the Secretary some measure of discretion, it must be construed in favor of the

states. In *Wyoming v. United States, supra,* 255 U.S. 489, the court established that statutes under the school land grant are to be "construed liberally rather than restrictively." (*Id.* at p. 508.)

Finally, the Secretary in his petition asserts a myriad of dire consequences should the states be allowed to select lands without an equal value rule including loss of revenues and timber. We would like to note that Congress could have established an equal value rule had it wished on several occasions when it amended sections 851 and 852. Indeed, it had no trouble establishing certain value and acreage tests in section 315g(c) of the Taylor Grazing Act. But Congress did not. Instead, it established a scheme whereby mineral lands must be exchanged for mineral lands and whereby the states cannot select land under mineral lease or permit in a producing or producible status.[1] The provisions were obviously enacted to protect the interests of the United States and to promote a certain degree of equality. However, if some inequality does exist in these statutes it is the people of the various states and not private interests which benefit. These lands and proceeds from these lands in the last analysis are held in trust by the states and benefit not only the people of the respective states but the people of the entire nation, through increased educational opportunities and benefits.

In conclusion, the district court and the court of appeals were correct in their well-reasoned decisions that the Taylor Grazing Act does not impact the school lands selection process. And, as the decisions of the district court and

1. Indeed it was only after the Attorney General halted the Secretary from instituting the "equal value" rule through a broad definition of a "producing or producible status" that the Secretary adopted the equal value test. (See, e.g., 70 I.D. 65.)

the court of appeals show even if the Taylor Grazing Act could be construed to give the Secretary some discretion with respect to school indemnity selections, such discretion does not include an "equal value" formula.

CONCLUSION

It is axiomatic that administrative agencies have only the power which Congress chooses to confer upon them. And it is clear that Congress has, through the years, reexamined the statutes governing state indemnity selections carefully, accepting some amendments and rejecting others. If there is any consistent pattern in the development of these laws, it is one of liberalization by Congress, opposed to reluctance by the Department of the Interior to implement Congressional programs leading to the release of lands to the states. Had Congress intended to authorize the Secretary to impose the equal value test, it would have done so by adopting the amendment he offered in 1966. Had Congress intended by enacting the Taylor Grazing Act to confer upon the Secretary discretion to impose such a test it might reasonably be assumed that the Secretary would not have deemed it necessary to offer his 1966 amendment. In any event, the Taylor Grazing Act, intended as it was to prevent private abuse of the public domain, is a slender reed on which to rest such a substantial encroachment of the rights of states to indemnity selections.

The Court of Appeals construed the law accurately below. In different circumstances, Utah's neighboring states in the ninth and tenth circuits might be satisfied to let the decision stand and to resist certiorari. But the Secretary has put us on notice only that he "may" follow the rule of

Utah v. Kleppe in both the Ninth and Tenth circuits. Petition, p. 12. The equivocal nature of his statement is pregnant with sinister possibilities. If the Secretary continues to adhere to the equal value rule with the tenacity and supple logic which he has heretofore applied, a multiplicity of actions throughout the western states may follow. The only means by which this salutary rule can be applied equally and equitably among the states to which it applies, with any certainty, is by summary affirmance by this Court.

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